provisions of the policies, and particularly the provisions thereof excluding from the accidental coverage death caused directly or indirectly by disease or illness of any kind or by mental infirmity. It seems obvious that the issues of fact and law as to whether Embry's death was accidental under the Workmen's Compensation Act and whether it was accidental under the provisions of the policies are not identical, but are separate and distinct issues and do not come within the second rule laid down by the Henderson case, supra." (A26 of Petition, *Embry* v. *The Equitable Life Assurance Society of the U. S.*, 451 F.2d 470, at 477).

Petitioner's statement on page 5 of her Petition that an action for workmen's compensation benefits is contractual in nature is taken out of context and totally inapplicable to the issues here presented. The case cited by petitioner (*Gawjth* v. *Gages Plumbing & Heating Co., Inc.*, 206 Kan. 169, 476 P.2d 966. [1971]) in support of such contention concerns the separation of powers doctrine between the legislative and judicial branches, and the "contract," referred to relates to the relationship of an employee to his employer, and not to proceedings under the Workmen's Compensation Statutes.

ARGUMENT

I. The doctrine of collateral estoppel is clearly inapplicable, as was correctly determined by the District Court and the Court of Appeals.

Petitioner's entire argument in paragraph I under "Reasons for Granting the Writ" presupposes and assumes that Embry's coronary arteriosclerosis was "dormant" at and prior to the accident of May 23, 1963. As stated, the assertion that coronary arteriosclerosis is considered "dormant" as a matter of law in Kansas has never before been raised by petitioner. We fail to understand how

petitioner can now initiate such a patently absurd contention when she totally failed to urge such at the trial, either through requested instructions, argument to the court, or otherwise. If such were the law, then the nonapplication of the doctrine of collateral estoppel to our situation might not have been so "apparent" to the District Court, nor so "obvious" to the Court of Appeals.

The Workmen's Compensation Act is totally statutory, was conceived and is founded on broad social considerations, is liberally construed in favor of workmen, and proceedings thereunder are exclusively limited to questions arising under the Act." *Anchor Casualty Co.* v. *Wise*, 172 Kan. 539, 241 P.2d 484 (1952); *Thuillez* v. *Yellow Transit Freight Lines*, 187 Kan. 618, 358 P.2d 676 (1961); and *Madison* v. *Key Work Clothes*, 182 Kan. 186, 318 P.2d 991 (1957).

The insurance policies in this case are contracts, and liability is measured by the insuring language thereof. Unambiguous insurance provisions defining the conditions for recovery must be construed in their ordinary sense as written, are binding on the parties, and must be enforced according to their plain terms. *Braly* v. *Commercial Casualty Ins. Co.*, 170 Kan. 531, 227 P.2d 571 (1951); *Knouse* v. *Equitable Life Ins. Co.*, 163 Kan. 213, 181 P.2d 310 (1947); and *Brown* v. *Metropolitan Ins. Co.*, 166 Kan. 616, 203 P.2d 150 (1949), where the court states:

> "Above all else it must be kept in mind this action is predicated upon an insurance contract the terms of which are binding upon the parties and cannot be changed by the courts. Indeed, unless the provisions in question are ambiguous, the rule is they are not susceptible of judicial interpretation but must be construed in their ordinary sense (*Watkins* v. *Metropolitan Life Insurance Co.*, 156 Kan. 27, 29, 131 P.2d

722; *Bott* v. *Equitable Life Assur. Society*, 147 Kan. 671, 78 P.2d 860; *Lane* v. *Insurance Co.*, 109 Kan. 296, 198 Pac. 948; *Spence* v. *New York Life Ins. Co.*, 154 Kan. 379, 118 P.2d 514)."

The rule of collateral estoppel expressed by the Court of Appeals in its opinion in this case, citing *Henderson* v. *United States Radiator Corporation*, 78 F.2d 674 (10th Cir.), is as follows:

> "(2) Any right, fact or matter in issue and directly adjudicated, or necessarily involved in the determination of an action before a competent court in which a judgment or decree has been rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated between the same parties and their privies, whether the claim, demand, purpose or subject-matter of the two suits is the same or not.
>
> "The principle of the . . . rule is referred to as . . . 'conclusiveness of judgment.'" (*Embry*, 451 F.2d 470, at 472).

We agree with the District Court and the Court of Appeals that it does indeed seem apparent and obvious that the conditions for recovery under the statutory Workmen's Compensation Act and under the insurance contracts are different and involve separate and distinct issues, and that, therefore, collateral estoppel does not apply.

Petitioner's exercise in sophistry in discussing the intricacies of the full faith and credits clause as applied to the doctrine of collateral estoppel is wholly inapplicable to the issues in our case. It is based on the fallacy that the issues in the two cases were identical, when the contrary is apparent and obvious. It is also based on the patently erroneous assumption that coronary arteriosclerosis is

considered "dormant" as a matter of law in Kansas under insurance cases.

II. Coronary arteriosclerosis is not considered a "dormant" disease as a matter of law under insurance cases in Kansas or any other jurisdiction.

The most incredible theme woven throughout the entire Petition, and the one which forms the basis for all of Petitioner's arguments and contentions, is that coronary arteriosclerosis is considered "dormant" as a matter of law in Kansas. The fact that such an assertion is medically and legally absurd is or should be all the more embarrassing to petitioner when we recall that she has never ever mentioned such a contention until it surfaced in her Petition here. Certainly no such argument was advanced by her at the trial, for she not only failed to object to any of the court's instructions, and the form of special verdict, but she did not tender or request an instruction even remotely suggesting such an unsound rule.

The *Williams* case, supra, upon which petitioner so strongly relies, actually states quite the opposite. One of the essential and vital issues in any case of this kind is the nature of a preexisting disease in the insured—that is, was it "dormant" or was it "active" at the time of the accident. The Kansas Supreme Court considers such determination to be one for the jury. The Kansas court states the rule in *Williams*, supra, as follows:

> "We think the better reasoned rule, and the rule which, in effect, was followed in *Williams* v. *General A. F. & L. Assurance Corp.*, supra, to be just this: that where an accidental injury aggravates or energizes a dormant disease or physical ailment the accident may be said to have been the proximate cause of the resulting disability within the terms and meaning of

the ordinary accident insurance policy." (*Williams*, 434 P.2d 765, 769).

The District Court literally followed this rule and gave the following instruction, to which petitioner did not object:

> "Now, in determining whether or not death resulted solely or proximately from bodily injuries, caused directly, exclusively and independently of all other causes, by external, violent and purely accidental means, you are instructed that when an accidental injury aggravates or energizes a dormant disease or physical ailment, the accident may be said to have been the proximate cause of the resulting death, and that death resulted from accident within the terms and meanings of the policies here in question." (R. 311).

Then immediately after stating the rule above quoted, the Kansas court in *Williams*, supra, states:

> "Such is the rule laid down in *Howe* v. *National Life Ins. Co.*, 321 Mass. 283, 72 N.E. 2d 425, 170 A.L.R. 1254, where it was said:
>
> "'. . . A death caused by bodily injuries accidentally sustained would be within the terms of the policy if the accident, by reason of the frailty or general weakness of the insured, a predisposition to a disease, or the presence of a disease then inactive or dormant, resulted in a fatal termination, even if this result would not have followed if the injured person was in normal health. . . .'" (p. 287).

The District Court again lifted such rule literally and instructed as follows, petitioner again not objecting:

> "A death caused by bodily injuries, accidentally sustained, would be within the terms of the policy

> provision which I have quoted to you, when, by reason of the frailty or general weakness of the insured, a predisposition to a disease or the presence of a disease then inactive or dormant, such accidental injuries resulted in a fatal termination, even if this result would not have followed if the injured person was in normal health." (R. 311). (*Williams*, 434 P.2d 765, 769).

Other such examples of how literally close the District Court followed the Kansas law in instructing the jury could be cited. For instance, the District Court defined for the jury in its instructions the word "dormant" and the word "active" (R. 313), utilizing exactly the same language as the Kansas Supreme Court in *Williams*, supra.

In view of the above, it is difficult to follow petitioner's argument that the Federal Courts did not apply the law of the State of Kansas. At the trial, petitioner did not object to the jury determining the question of the "dormancy" or "activity" of Embry's coronary arteriosclerosis. Petitioner did not at any stage of the proceeding endeavor to have the District Court rule as a matter of law that coronary arteriosclerosis is a "dormant" disease under insurance contract cases. Nor did she proffer such suggestion in any form whatsoever to the District Court during the trial.

In its opinion, the Court of Appeals answers petitioner's contention that the Federal Courts failed to follow the law of the State of Kansas by stating:

> "In his charge to the jury, the court followed very closely the test laid down by the Supreme Court of Kansas in Williams v. Benefit Trust Life Insurance Company, supra." (*Embry*, 451 F.2d 470, at 485).

CONCLUSION

Petitioner fully advanced, agreed with and supported the theories under which this case was tried to the jury by the District Court. She made no objections to the instructions, to the form of special verdict, and she further failed to submit requested instructions which embody any of the contentions now raised here for the first time. Having lost the case at the District Court level, petitioner now seeks to change theories. The Equitable was clearly entitled to a jury trial on the issue of its contractual liability to petitioner. The decision below is manifestly correct in that it follows and applies the insurance law of the State of Kansas. That law was accurately and thoroughly summarized in the District Court's instructions to the jury. The decision will affect only the litigants herein and the decision is consonant with decisions in all other jurisdictions.

The Writ of Certiorari should be denied.

Respectfully submitted,

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March 8, 1972

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